Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

No. 76-648

In the Supreme Court of the United States

OCTOBER TERM, 1976

CITY OF ADAIR, IOWA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 539 F. 2d 1185. The opinion of the district court (Pet. App. 14a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered August 10, 1976. The petition for a writ of certiorari was filed November 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a city may levy a special assessment on real property of the Commodity Credit Corporation under 15 U.S.C. 713a-5, which exempts the corporation from all

taxation, except that state and local governments may tax its real property "to the same extent according to its value as other real property is taxed."

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article VI, par. 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 5 of the Act of March 8, 1938, 52 Stat. 108, 15 U.S.C. 713a-5, provides in pertinent part:

> The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Commodity Credit Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

STATEMENT

The undisputed facts of this case are set forth in the opinion of the court of appeals (Pet. App. 1a-3a). The Commodity Credit Corporation (CCC) is a corporate instrumentality and agency of the United States, within

the Department of Agriculture, which purchases and sells surplus agricultural commodities.[1] It is wholly owned by the United States. Commodity Credit Corporation Charter Act, Sections 2, 7, 62 Stat. 1070, 1072, as amended, 15 U.S.C. 714, 714e. By statute it is exempt from "all taxation" by federal, state and local governments "except that any real property of the * * * Corporation shall be subject to State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed." 15 U.S.C. 713a-5.

In 1973, the City of Adair, Iowa (hereinafter "the City"), a municipal corporation of the State of Iowa, levied a special assessment for a street improvement project against certain real property owned by the Commodity Credit Corporation (CCC) located within the municipal boundaries of the City. The total assessment against the property of CCC was $5,032.00, and CCC initially paid the City one-tenth of that amount—$503.20. Subsequently CCC demanded that the one-tenth installment be refunded, but the City refused. The United States then brought suit on behalf of CCC to have the special assessment levied against CCC's property declared null and void and to recover the $503.20 already paid to the City. The City counterclaimed for the balance of the assessment.

On cross motions for summary judgment, the district court entered judgment for the United States. It relied on two distinct grounds. First, it concluded that the property of the CCC was property "owned by the United States" within the meaning of the applicable law of the State of Iowa and, therefore, that the City was prohibited by state law from levying a special assessment against the property (Pet. App. 16a-18a). Secondly, it concluded that the property of CCC

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[1] See *Rainwater* v. *United States*, 356 U.S. 590, 591-592.

was constitutionally immune from state and local taxation, and that special assessments are not generally applicable real estate taxes to imposition of which Congress expressly consented in 15 U.S.C. 713a-5.

On the City's appeal, the court of appeals affirmed the judgment of the district court on the basis of its prior decision in *Board of Directors of Red River Levee Dist. No. 1 of Lafayette County, Ark.* v. *Reconstruction Finance Corp.*, 170 F. 2d 430 (C.A. 8).

ARGUMENT

The scope of the Commodity Credit Corporation's immunity from state and local taxes is expressly defined by statute, which bars imposition of "all taxation" except state and local taxes imposed on its real property "to the same extent according to its value as other real property is taxed." 15 U.S.C. 713a-5. We submit, therefore, that the only issue properly presented for review is whether a special assessment is a real property tax permitted by the terms of this statute. The court of appeals correctly resolved that issue on the basis of its earlier decision in *Board of Directors of Red River Levee Dist. No. 1 of Lafayette County, Ark.* v. *Reconstruction Finance Corp.*, 170 F. 2d 430 (C.A. 8).

That case involved a provision of the Reconstruction Finance Corporation Act that "exempted the RFC from all state taxation except real property taxes to the extent that other real property is taxed * * *" (Pet. App. 4a-5a). When a levee district attempted to impose a special assessment for certain improvements specifically benefiting a pipeline owned by the Reconstruction Finance Corporation, the Eighth Circuit held that the special assessment was not a tax to the extent that other real property is taxed, and hence was not within the provision of the Reconstruction Finance Corporation Act permitting state taxation of the RFC's real property.

Petitioner recognizes the distinction between generally applicable real estate taxes and special assessments, since it argues (Pet. 14) that "[a]n ordinary tax is a contribution to the general welfare of the sovereign government. On the other hand, a special assessment is very simply a payment by real property for benefits conferred on that property. See *Illinois Central Railroad* v. *Decatur*, 147 U.S. 190, 197-200 * * *." It contends, however, that because special assessments benefit rather than burden property, the statute permitting imposition of real estate taxes on CCC should be construed as consenting to the imposition of special assessments. It is well established, however, that a special assessment on property owned by the United States, or by its instrumentalities for the benefit and use of the United States, may not be imposed by state or local governments absent congressional consent. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89; *Lee* v. *Osceola Improvement District*, 268 U.S. 643, 645. Such a rule is necessary to prevent local governments from undertaking special improvements in the expectation that a substantial part of the cost will thereafter be recovered in the form of special assessments against federal instrumentalities. This principle of immunity applies without regard to the actual burden or benefit on federal functions. Such factors are taken into account only when the constitutional tax immunity of the United States is invoked derivatively by agents of the federal government such as employees and contractors. For example, in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, the Court held that a state could tax the salary of an employee of a federally created corporation, despite a claim of inter-governmental immunity, because the tax fell solely on the employee and was not "in form or substance a tax upon the * * * Corporation or its property or income, nor is it paid by the corporation or the government from their funds." *Id.* at 480. See also *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 117-118; *United States* v. *Allegheny County*, 322 U.S. 174, 176-177; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 149.

Swords v. *Nutt*, 11 F. 2d 936 (C.A. 9), is not to the contrary. That case held that a statute that waived immunity from property taxes for real estate owned by national banks also waived immunity from special assessments. But as the court of appeals pointed out (Pet. App. 12a), the national banks are essentially private organizations operated for their own profit under a federal charter, not federal instrumentalities wholly owned by the United States, like CCC. In addition, it is well established that congressional consent to state and local taxation of federal properties and functions must be clear, express and affirmative. *Kern-Limerick, Inc.* v. *Scurlock, supra*, 347 U.S. at 122; *United States* v. *Allegheny County, supra*, 322 U.S. at 177; *Mayo* v. *United States*, 319 U.S. 441, 446-448. For example, after the decision in *Red River Levee Dist., supra*, Congress amended the Reconstruction Finance Corporation Act to provide expressly that "any real property of the Corporation shall be subject to special assessments for local improvements * * *." 61 Stat. 205, 15 U.S.C. 607. In contrast, however, no similar provision has been adopted for the Commodity Credit Corporation.

Petitioner has set forth a number of arguments based upon the constitutionality of the *implied* tax immunity of the Commodity Credit Corporation as a federal instrumentality. Because of the express provisions of 15 U.S.C. 713a-5, however, it is unnecessary for the Court to reach these constitutional issues.[2] *Agricultural Bank* v. *Tax*

[2]Petitioners have not directly challenged the constitutionality of 15 U.S.C. 713a-5, nor could they do so in view of this Court's decisions recognizing that even without an express statute, properties, functions and instrumentalities of the United States are immune from state and local taxation, without congressional consent. *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *United States* v. *Allegheny County*, *supra*, 322 U.S. at 176-177; *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, 269.

Commission, 392 U.S. 339, 341.[3] In any event petitioner's contentions are foreclosed by a long series of decisions concerning the immunity of federal corporate instrumentalities. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102; *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, 32-33; *Van Brocklin* v. *State of Tennessee*, 117 U.S. 151, 180.[4] Since the real property in the instant case was held by CCC solely for the benefit and use of the United States, and CCC is a federally created corporation wholly owned and controlled by the United States, it follows that the property was constitutionally immune from state and local taxation, including special assessments, absent congressional consent.

[3]*Agricultural Bank* involved a claim that national banks were no longer entitled to tax immunity as federal instrumentalities because the subsequent establishment of the Federal Reserve System deprived them of the unique quality concerning the currency which had given them the character of a federal instrumentality. The Court held that their immunity survived because the express language of 12 U.S.C. 548 "marks the outer limit within which States can tax national banks." *Id.* at 345.

[4]The petitioner relies (Pet. 8) primarily upon three decisions in making its argument that the real property of a federally created corporation is not immune from state and local taxation: *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *Van Brocklin* v. *State of Tennessee*, *supra*. But in the *Van Brocklin* decision the Court explained the holdings in *Osborn* and *Peniston* by drawing a distinction between property owned by an agent, which agent was itself *not* wholly owned by the United States, and property owned by the United States. The Court indicated that the property of such an agent was not immune from taxation unless the tax fell on the means employed by the United States. 117 U.S. at 156-157, 177.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JANUARY 1977.

DOJ-1977-01